IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 9, 2001

RICHARD HARRIS v. CHARLES TRAUGHBER, ET AL.

Appeal from the Chancery Court for Davidson County
No. 99-1964-III Ellen Hobbs Lyle, Chancellor

No. M2000-01146-COA-R3-CV - Filed July 13, 2001

Plaintiff, an incarcerated state prisoner, brought suit for immediate injunctive relief, a common law writ of certiorari and relief from alleged civil rights violation under 42 U.S.C. § 1983. The chancellor held all issues in favor of the defendants and we affirm the chancellor

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S. and WILLIAM C. KOCH, JR., J., joined.

Patrick T. McNally, Nashville, Tennessee, for the appellant, Richard Harris.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General and Pamela S. Lorch, Assistant Attorney General for the appellees, Charles Traughber, et al.

OPINION

Plaintiff, Richard Harris, was convicted in 1992 of sexual battery, aggravated sexual battery and rape. At the time of his 1992 conviction, Tennessee Code Annotated section 40-28-105(d)(3) required only three affirmative votes of the members of the parole board to grant parole. In 1998, the statute was amended to require four votes in the affirmative for a parole grant for certain crimes, among which were the crimes of aggravated sexual battery and rape.

On March 18, 1999, Harris was denied parole by a vote of three members of the parole board in favor of parole and four members against parole.

The primary thrust of the complaint is that the 1998 amendment to Tennessee Code Annotated section 40-28-105(d)(3) is unconstitutional as applied to the plaintiff because of ex post facto considerations. In addressing these parts of the complaint, the trial court held:

Writ of Certiorari is a Proper Means of Redress

In their motion to dismiss, the defendants assert that it was improper for the plaintiff to seek review of his denial of parole by a petition for a common law writ of certiorari. The defendants acknowledge that the plaintiff asserts as the premise for a writ that the statutory provision in issue, Tennessee Code Annotated section 40-28-105(d)(3), is unconstitutional. But the defendants assert that that provision has never been declared unconstitutional by a court, the Board is compelled to comply with the law as written and so, in this case, where the Board followed the statute as changed to require a four-person majority, the Board did not act illegally, fraudulently or arbitrarily so as to warrant certiorari review by this Court.

This Court has studied the case of *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871 (Tenn.App. 1994) and notes that the court stated in that case, "If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would not be subject to judicial review." *Id*. at 873. This Court concludes that the inverse of that statement, i.e., if the agency or board reached its decision in an unconstitutional manner its decision would be subject to judicial review, can be extrapolated from *Powell*. Accordingly, this Court concludes that if the statute in issue, Tennessee Code Annotated section 40-28-105(d)(3), is unconstitutional, then it is appropriate for the plaintiff to have sought a writ of certiorari from this Court.

The only proper defendant, however, on a writ of certiorari is the particular board or agency whose actions are being reviewed by the court. *Fairhaven Corp. v. Tennessee Health Facilities Comm'n*, 556 S.W. 885 (Tenn.App. 1976). Tennessee Code Annotated section 27-9-104 provides, "The petition . . . shall name as defendants the particular board or commission and such other parties of record, if such, as were involved in the hearing before the board or commission, and who do not join as petitioners." Thus, the only proper defendant before the Court on the writ of certiorari is the Tennessee Board of Paroles. Only if the Court sustains the cause of action of the plaintiff under 42 U.S.C. § 1983 is the other defendant a proper potential defendant to this case.

. . .

Ex Post Facto Analysis

As to the merits of the plaintiff's claim that he is entitled to a writ of certiorari because the Board reached its decision to deny him parole in unconstitutional and unlawful manner by violating the ex post facto clause in the Tennessee constitution, the Court denies the claim.

While it is true that the appellate court in *Kaylor v. Bradley*, 912 S.W.2d 728, 732 (Tenn.App. 1995) stated that the retroactive alterations of the criteria for parole

eligibility can implicate ex post facto concerns since eligibility for parole consideration is part of the law annexed to the crime when committed, *Kaylor* also states that there are no bright line rules for analyzing ex post facto claims and that the determinations must be made on a case by case basis. *Kaylor* notes that the outcome depends on the significance of the right involved and the significance of the impairment.

In this case what is at issue is that Tennessee Code Annotated section 40-28-105(d)(3) was amended January 1, 1998, to require the concurrence of four board members, as opposed to three board members, to grant, deny or rescind parole for persons convicted of certain offenses, including the plaintiff's offense of rape and aggravated sexual battery. Unlike *Kaylor*, the plaintiff in this case has demonstrated that there is nothing speculative about his release on parole under the law in effect at the time of his offense – there were three board members who voted to release the plaintiff on parole. Thus, under the provisions of section 40-28-105(d)(3) in effect at the time of his conviction, the plaintiff would have been granted parole.

Nevertheless, this Court determines that the legislative amendment to increase the requisite votes for the granting of parole under a handful of targeted crimes does not redefine the offense for parole eligibility nor does it change the substantive law annexed to the targeted offenses, as argued by the plaintiff. This Court has studied *Cummings v. Burt*, 121 F.3d 707, 1997 WL 437114 (6th Cir. (Mich.))(1997). In that case the court considered a change in a Michigan statute which reduced the frequency of subsequent mandatory parole hearings to once every five years and also increased the size of the majority required to vote for parole. The court was not persuaded that increasing the parole board to ten members and the resulting majority required to vote for release violated the ex post facto clause. The court reasoned that changes in the number of parole board members was a procedural matter and did not implicate ex post facto protections. The court also noted, for purposes of analysis under the *Morales* test, that the parole guidelines remained essentially constant so that increasing the size of the parole board and the majority needed did not increase the petitioner's burden to qualify for parole. The court concluded that the petitioner had no greater substantive burden in convincing six members than in convincing three members, as long as the same standards applied.

Although the plaintiff has argued in this case that requiring a "super-majority vote" in favor of parole does significantly increase the substantive burden to qualify for parole because it increases the concurring votes from three members out of seven to a requisite four members from the same seven, the Court disagrees using the *Cummings* court's analysis as guidance in this matter.

We agree with the reasoning of the chancellor. Mr. Harris was denied parole on the finding of the parole board that his release from custody in 1999 would depreciate the seriousness of the

crime of which the defendant stands convicted or promote disrespect for the law. This is the standard for parole as a privilege and not a right. Tenn. Code Ann. § 40-35-503(b). The 1998 amendment to this code section did nothing to change the standard.

The Supreme Court of the United States has held:

> [E]ven if a law operates to the defendant's detriment, the ex post facto prohibition does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert*, 432 U.S., at 293, 97 S.Ct., at 2298. Hence, no ex post facto violation occurs if the change in the law is merely procedural and does "not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590, 4 S.Ct. 202, 210 28 L.Ed. 262 (1884). *See Dobbert, supra*, at 293-294, 97 S.Ct. at 2298 ("The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.")

Miller v. Florida, 482 U.S. 423, 433; 107 S.Ct. 2446, 2452 (1987).

Likewise, the United States Supreme Court in *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597 (1995) addressed a California legislative amendment decreasing the frequency of parole suitability hearings, which change was challenged under the ex post facto clause. Said the court:

> Respondent nonetheless urges us to hold that the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment. In his view, there is "no principled way to determine how significant a risk of enhanced confinement is to be tolerated." Brief for Respondent 39. Our cases have never accepted this expansive view of the Ex Post Facto Clause, and we will not endorse it here.
>
> Respondent's approach would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement. Under respondent's approach, the judiciary would be charged under the Ex Post Facto Clause with the micro management of an endless array of legislative adjustments to parole and sentencing procedures, including such innocuous adjustments as changes to the membership of the Board of Prison terms, restrictions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor. These and countless other changes might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him

> to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes.

California Department of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597, 1602-1603 (1997).

Finally, the trial court in this case relied heavily on *Cummings v. Burt*, 121 F.3d 707 from the Sixth Circuit Court of Appeals in concluding that Mr. Harris was not subjected to an ex post facto law by the 1998 amendment to Tennessee Code Annotated section 40-28-105(d)(3). In *Cummings*, a Michigan statute was challenged under the ex post facto clause. This statute provided for a decrease in the frequency of parole hearings and an increase in the number of members of the parole board from five members to ten members. The court held:

> Moreover, this Court is not persuaded by Petitioner's argument that increasing the Parole Board to ten members and the resulting majority required to vote for his release violates the Ex Post Facto Clause. Changes in the number of Parole Board members is a procedural matter and does not implicate ex post facto protections. *Collins*, 497 U.S. 37, 45; *Miller v. Florida*, 482 U.S. 423 (1987). Furthermore, under the *Morales* test, Petitioner has not demonstrated how the change in the size of the parole Board creates a sufficient risk of increasing his punishment. The 1992 amendments do not increase the Petitioner's burden to qualify for parole. The parole guidelines remain essentially constant. Mich. Comp. Law Ann. § 791.233e. Thus, Petitioner has no greater substantive burden in convincing six members than in convincing three members, as long as the same standards apply.

Cummings v. Burt, 121 F.3d 707, 1997 WL 437114 (6th Cir. Mich. 1997). The trial court correctly determined the issue presented by the common law writ of certiorari in favor of the defendant.

As the appellant did not brief on appeal, the action of the chancellor in dismissing his claim under U.S.C. 42 § 1983, nor the dismissal of Charles Traughber as a defendant, these issues have been effectively abandoned. *Hunter v. Burke*, 958 S.W.2d 751, 757 (Tenn.Ct.App. 1997). The judgment of the chancellor is in all respects affirmed and costs of appeal assessed against appellant.

_____

WILLIAM B. CAIN, JUDGE